IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 626 of 1986

with

FIRST APPEAL No 627 of 1986

with

FIRST APPEAL No 636 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA and

MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NATIONAL INSURANCE CO LTD

Versus

BAI SHANTABEN W/O DECEASED PUNAMCHAND LALABHAI BHOI

Appearance:

MR RAJNI H MEHTA for Petitioner
MR JC SHETH for Respondent No. 1
DELETED for Respondent No. 3
MR MAGANBHAI M DESAI for Respondent No. 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA and
MR.JUSTICE H.K.RATHOD
Date of decision: 24/01/2000

ORAL JUDGEMENT

These three appeals arising out of a common award rendered by Motor Accident Claims Tribunal, Panchmahals, Godhra on 29.11.1985 are proposed to be disposed of by a common judgement in as much as common questions of law and fact are involved in these three appeals.

2. In First Appeal No. 636 of 1986, notice was served on respondent no.1 to 6, 7 and 8. Shri Maganbhai N Desai filed appearance on behalf of the respondent no. 8/1 to 8/2 but today inspite of revision of list twice nobody appeared on behalf of these respondents. Similarly, in First Appeal No. 626 of 1986 appearance of Shri J.C.Sheth is shown on behalf of respondent no.1 and 2 and on behalf of the respondents 4/1 to 4/4 & 4/6 to 4/8 and Shri Maganlal N Desai respondent no.3 has been deleted. None appears on behalf of these respondents and respondent Nos. 4 and 4/5. Shri J.C.Sheth also did not appear despite revision of list twice. In First Appeal No. 627 of 1986, again Shri J.C.Sheth and Shri M.N.Desai did not appear though the list was revised twice. As such Shri Rajni H Mehta, Learned Counsel for the appellants was heard and the record was perused.

3. As many as 24 motor accident claim petitions were filed under Section 110-A of the Motor Vehicles Act claiming compensation for death of six persons and bodily injuries sustained by 18 persons in an accident which took place on 10.2.82. These persons were travelling as passengers in commercial vehicle. i.e. Truck No. 3206. The said vehicle was being driven by opposite part no.1 before the Tribunal. The vehicle was owned by opposite party respondent no.2/1 to 2/5 and the opposite party no.3 before the Tribunal is appellant before us, viz. the Insurance Company. These appeals arise out of an award of the Tribunal in MACT Case No. 182/82 awarding compensation of Rs.98300/-, in MACT Case No. 184/82

awarding compensation of Rs.25500/- and in MACT Case No. 348 of 1983 awarding compensation of Rs.78800/- and the amount has been made payable jointly and severally by all the opposite parties. Shri Mehta informed that 24 persons were travelling in the said truck with the goods out of which 6 persons were labourers and 18 persons were either owners of the goods being carried in the aforesaid truck or other persons. He further informed that only these three appeals survive and other appeals have already been disposed of on one ground or the other.

4. The sole contention of Shri Mehta has been that since the accident took place on 10.2.82 and since at that time, the liability of the Insurance company for the death or injury of persons travelling in commercial vehicle was not made under the statute nor it was covered under the specific policy issued by the Insurance Company - Appellant, hence the Tribunal was in manifest error in awarding compensation against the Insurance Company as well. It may further be mentioned at this stage that neither the driver opposite party no.1 before the Tribunal nor the heirs of the deceased owner of the vehicle filed any appeal against the impugned award. Consequently, the award of the Tribunal against the driver and the legal heirs of the owner of the vehicle has become final and it cannot be questioned, altered or modified in this appeal.

5. The only point to the considered is whether Insurance Company - appellant is liable to pay any compensation. Shri Mehta has taken us through the findings of the Tribunal recorded on issue no.2 and has also brought to our notice, judgement of the Apex Court in Smt. Mallawwa etc. V/s Oriental Insurance Company Ltd. and Others reported in JT 1998 (8) SC 217 and has argued that this judgement was rendered by the Apex Court on a reference made by a Division Bench of the Apex Court presided over by Honourable Mr.Justice Bharucha and in this case, the Apex Court after examining the various conflicting decisions of various High Courts has approved the view taken by the Orissa High Court in the case of New India Assurance Co. Ltd. Vs. Kanchan Bewa and Others, 1994 ACJ, 138.

6. So far as the factual aspect is concerned, there is not much of controversy. Shri Mehta has however assailed the findings of the Tribunal on issue no.2 and he was right in his submission that the Tribunal fell in error in observing that because there was no prohibition in the permit of the vehicle to carry passengers, the Insurance Company is liable to pay compensation. We are

in agreement with the contention of Shri Mehta. It is a matter of common knowledge that road permit for a vehicle is issued for plying a vehicle on the road and routes and that it has nothing to do with the prohibition or no prohibition for carrying passengers. The liability of the Insurance company is to be judged from the Insurance Policy itself. So far as commercial vehicles are concerned there was no statutory liability on the relevant date i.e. the date of accident for the insurance company - appellant to indicate that it was not liable to pay compensation for death and injury of persons or passengers carried on commercial vehicle. Shri Mehta has shown to us the Insurance policy and the limitations to use the vehicles i.e. Public Carrier are mentioned in rubber stamp which forms part of the terms and conditions of the policy. It recites that the Public Carrier shall be used only for a Public Carrier Permit within the meaning of Motor Vehicles Act, 1939 and the policy does not cover:

1. use for organised racing pace-making reliability trial or speed testing;

2. Use while drawing a trailer except the towing other than the reward of anyone disabled mechanically propelled vehicle;

3. Use for the conveyance of passengers for hire or reward.

In this case, we are concerned with clause 3 only which prohibits use of public carrier for conveyance of passengers for hire and reward. Thus the Insurance policy itself prohibits use of commercial vehicle i.e. Public Carrier for use for conveyance of passengers for hire or reward. If this was specific in the insurance policy then we are unable to agree with the Tribunal that the liability of the Insurance Company could be upheld. We are again unable to agree with the findings recorded by the Tribunal that the Insurance Company is liable under Section 96 of the motor Vehicles Act. There is a finding recorded by the Tribunal that in the ill-fated truck there were certain goods which were being carried at the time of accident and they were in the nature of bamboo sticks, cabins and other goods and the hotel and shops materials were being carried besides labourers and other passengers and owners of those goods. On this issue, the Tribunal observed that the truck was essentially hired for public goods and six persons who were sitting in the truck at the relevant time were owners of the goods alongwith other persons. According

to the Tribunal it was not a case where those persons were being carried for hire or reward in the ill-fated truck.

7. There is no finding recorded by the Tribunal that the ill fated truck on previous occasions was also being used for like purposes i.e. for carrying goods as well as labourers, owners of goods and other persons. Therefore it cannot be said that the truck in question was generally used for the aforesaid purposes. If on one occasion only it was so used it cannot be said that it was a vehicle meant for carriage of passengers also.

8. The Scope of Section 95(1)(b)(i) was considered by the Apex Court in Smt.Mallawwa's case (Supra). The Court held in Para 10 that:-

> "10. For the purposes of Section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers have carried if the vehicle was of that class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used than that vehicle can be said to be vehicle in which passengers are carried for hire or reward. The High Courts have expressed divergent views on the question whether a passenger can be said to have been carried for hire or reward when he travels in a goods vehicle either on payment of fare or alongwith his gods. It is not necessary to refer to those decisions which were cited at the Bar as we find that all the relevant aspects were not taken into consideration while expressing our view or the other."

The Apex Court further considered the Orissa view in New India Assurance Co. Ltd. (Supra) and concluded

that in our opinion the said view is correct even otherwise also and the contrary views expressed by other High Courts have to be recorded as incorrect.

9. The Apex Court has further observed in this case that the correct test to determine whether a passenger was carried for hire or reward would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. It would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward.

10. Applying this law laid down by the Apex Court to the facts of the case before us, it is clear that there is nothing on record or in the award of the Tribunal that the ill fated bus except for one occasion was used for carrying goods alongwith the owners of the goods, labourers and other passengers. Consequently, in our view, the Tribunal fell in manifest error in holding that the appellant - Insurance company is equally liable jointly as well as severally to pay the compensation assessed by it. We have therefore no option but to allow these appeals. In the result, these three appeals succeed.

11. First Appeal No. 626, 627 ad 636 all of 1986 are hereby allowed. The impugned awards arising out of MACT No. 182, 184 and 348 all of 1982 against the appellant only are set aside. Since no appeal has been filed by the owners and driver of the vehicle, the award shall remain intact against them. Since nobody has appeared from the side of the respondents, the appellant shall bear its own costs. At this stage, Shri Mehta points out that the amount of compensation, costs and interest has been deposited with the Tribunal concerned. He also informed that under the orders of the Court some amount of compensation has been withdrawn by the claimants. As such the remaining amount of compensation, interest and costs lying in deposit with the Tribunal concerned shall be refunded to the appellant.

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